Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

November 8, 1995

Mr. Thomas L. Finlay
Deputy City Attorney
City of San Antonio
P.O. Box 839966
San Antonio, Texas 78283-3966

OR95-1198

Dear Mr. Finlay:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 34786.

The City of San Antonio (the "city") received a request for copies of all equal employment opportunity ("EEO") investigative files into the EEO complaints the requestor filed with the city in 1995. You claim that the requested information is excepted from disclosure under section 552.103 of the Government Code. We have considered the exception you claimed and have reviewed the documents at issue.

Section 552.103(a), the "litigation exception," excepts from disclosure information relating to litigation to which the state is or may be a party. The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The city must meet both prongs of this test for information to be excepted under 552.103(a).

Litigation cannot be regarded as "reasonably anticipated" unless there is more than a "mere chance" of it--unless, in other words, we have concrete evidence showing that the claim that litigation may ensue is more than mere conjecture. Open Records Decision Nos. 452 (1986), 331 (1982), 328 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision Nos. 452 (1986), 350 (1982). This office has concluded that litigation is reasonably

anticipated when an attorney makes a written demand for disputed payments and promises further legal action if they are not forthcoming, and when a requestor hires an attorney who threatens to sue a governmental entity. Open Records Decision Nos. 555 (1990), 551 (1990). You state that the city maintains an Equal Employment Opportunity Program, which has the duty of investigating complaints of city employees about discriminatory treatment in the city work force. You state that an employee may choose to go directly to the federal Equal Employment Opportunity Commission ("EEOC"), but many choose to go through the city's program first. If an employee is dissatisfied with the result of the city's program, he or she is then free to go to the EEOC. We note that the city's program is not a designated or certified FEP agency under section 2000e-5(c) of title 42 of the United States Code. *See* 29 C.F.R. §§ 1601.3(a), .70, .74, .80. Therefore, it cannot make final determinations on discrimination claims. *See id.* § 1601.77. Consequently, an employee will still be required to file a claim with the EEOC before he or she can sue the city for discrimination. We therefore conclude that litigation is not reasonably anticipated. Consequently, the city may not withhold the requested information under section 552.103.[1]

However, some of the information contained in the documents submitted to this office for review is excepted from disclosure by common-law privacy under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by common-law privacy and excepts from disclosure private facts about an individual. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Therefore, information may be withheld from the public when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities, and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1.

In *Morales v. Ellen,* 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen,* 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

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[1]We note that you state the requestor has been in touch with the EEOC on this matter. However, you do not demonstrate that the requestor has filed a complaint with the EEOC. Contacting the EEOC, without more, is insufficient to establish reasonable anticipation of litigation.

Based on *Ellen*, the city must withhold the individual witness statements in which the alleged sexual harassment is discussed, as one of the memoranda, the Management Briefing, submitted to this office for review is an adequate summary of the investigation into the alleged sexual harassment. However, we find that the public interest in the statement of the alleged harasser outweighs any privacy interest he may have in that information. Therefore, the city may not withhold his statement. With the exceptions noted below, the city may not withhold the remaining documents. The documents you submitted would serve to identify the victim of alleged sexual harassment. Since the identity of the victim to the alleged sexual harassment is protected by the common-law privacy doctrine as applied in *Ellen* and *Industrial Foundation,* the name of the individual must be redacted before any information may be released to the public. However, you may not withhold information under section 552.101 on the basis of protecting a requestor's own common-law privacy interests. Open Records Decision No. 481 (1987) at 4. Thus, the victim's name need not be redacted prior to releasing the requested information to the victim, who is the requestor here.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination under section 552.301 regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

Stacy E. Sallee

Stacy E. Sallee
Assistant Attorney General
Open Records Division

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Ref.: ID# 34786

Enclosures: Marked documents